IN THE SUPREME COURT OF THE STATE OF NEVADA

LARRY DECORLEON BROWN, Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, COUNTY OF CLARK, THE HONORABLE VALERIE ADAIR, DISTRICT COURT JUDGE – DEPT. XXI Respondent, and THE STATE OF NEVADA, Real Party in Interest,	No. (DC. No. C-17-326247-1)

PETITION FOR WRIT OF MANDAMUS

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POINTS & AUTHORITIES

I. INTRODUCTION

Mr. Brown files this Writ of Mandamus seeking a ruling on three issues related to the forensic science the State seeks to introduce during trial.

First, the State moved to introduce the contents of a password-locked Samsung smartphone purportedly accessed by the private company, Cellebrite, without any public testimony as to the means by which this feat was performed. Appendix, Vol. 1, pp. 18-39 (hereafter referred to as App. Vol. 1). The State developed two ways to proceed in accessing the phone associated with Mr. Brown. The State received an order from the District Court giving them the authority to use Mr. Brown's fingerprint to unlock the phone. App., Vol. 1, pp. 143-144. Then the State retained Cellebrite to unlock the phone.

The State filed a motion asking the analyst from the company give no public testimony about how he unlocked the phone in this case. App., Vol. 1, pp. 40-47. As authority, the State cited Cellebrite's concern about divulging trade secrets but otherwise provided no legal rationale to drastically limit cross-examination in this criminal trial. The District Court considered the issue and opined that presenting how Cellebrite was able to obtain the contents of the phone would likely be confusing to the jury as they could not understand the technical process, nor could the judge or the lawyers. App. Vol. 1. pp 125-126; 133-134. The Court ignored Mr.

Brown's objection to precluding this area of cross-examination at trial under the rule of Crawford v. Washington, 541 U.S. 36 (2004). The Court ruled that what—if any—cross-examination of Cellebrite's analyst in the case about the methodology used to extract data from the phone would occur in a sealed hearing during the trial, but outside the presence of the jury. The District Court has not yet ruled that Mr. Brown would be categorically prevented from cross-examining Cellebrite's analyst before the jury, but the court's comments about the confusing nature of such technical testimony indicates that such a ruling is a foregone conclusion. Moreover, on November 21st, the court made assurances to counsel for Cellebrite that questioning of any analyst at trial would be limited to the area of chain-of-custody. It does not appear Cellebrite will participate in this prosecution if they are required to answer publicly to anything more than questions about chain-of-custody. It is the State's position that Cellebrite should only answer questions about chain-of-custody.

Secondly, the court ruled that no expert testimony was required to aid the jury in deciding whether bloody partial footwear impressions left on the scene were made by one of a pair of shoes recovered from Mr. Brown's girlfriend's house. App., Vol. 1, p. 151. The court held that so long as the State was not going to make arguments that the footwear impressions in question matched the gait, or otherwise evidenced unique characteristics of the wearer of the shoe, the evidence was admissible without expert testimony. The court held that a jury could review photographs of the shoes

and the photographs of the partial impressions recovered to decide whether the specific pair of shoes photographed made the bloody partial footprints that were photographed in this case. Such a presentation of evidence by the State amounts to burden shifting as it places the defendant in a position of being unable to challenge the validity of such a comparison or having to call an expert to explain the questionable scientific validity of forensically identifying a particular shoe based upon footwear impressions.

Finally, Mr. Brown moved to obtain Corrective Action Reports (CAR) for the technicians working at the Metropolitan Police Department Forensic Lab at the time the testing was performed in this case, to challenge the accuracy of the lab's work. See Hover v. State, No. 63888, 2016 WL 699871; 2016 Nev. Unpub. LEXIS 468 (Nev. Feb. 19, 2016). In the instant case, a vehicle being tested for touch DNA produced a match with the DNA of a forensic analyst employed by LVMPD that was not documented to be in the room where the testing occurred until the day after testing was concluded. Here, one of the more inculpating pieces of evidence against Mr. Brown is his touch DNA found on a black nitrile glove near the decedent's body. The court held that it would follow a recent purported decision by Judge Leavitt, limiting Mr. Brown only to Corrective Action Reports for the technicians that worked on the testing performed in the specific case for a period of five years. App.,

Vol. 1, pp. 90-92. Mr. Brown's motion requested was for all Corrective Action Reports associated with the lab.

These three issues are important to decide now. Clark County's unique "Homicide Court Program" has positioned four judges to lead the way on developing criminal law issues in the most populous county in Nevada, thereby affecting the practice of Criminal Law throughout the state. The District Courts in the Homicide Court Program are beginning to cite each other or refer to discussions of internal meetings to develop a unified approach to legal requests made by defense attorneys representing defendants charged with murder. In this case, the District Court's solution to Mr. Brown's request was to follow Judge Leavitt's decision in another case. Purportedly, Judge Leavitt ordered in another case that the defendant receive corrective action reports only for analysts involved in that case. Although this may be what Judge Leavitt ordered in that other case, the underlying facts of that case are unclear and this solution does not address Mr. Brown's request, which was for material that gave him the ability to challenge LVMPD's DNA Lab's accuracy through errors committed in other cases.

This writ presents the Court with a unique opportunity to delineate a framework when it appears the District Court is abusing its discretion. If this Court does not intervene when it sees an abuse of discretion, particularly among the judges in the Homicide Court Program, there is a risk that these mistakes will

be repeated in multiple cases presenting the appellate courts with a cascade of cases with the same issues.

II. ROUTING STATEMENT

"Rule 17: Division of Cases Between the Supreme Court and the Court of Appeals." Subsection (b) of Rule 17 provides that certain cases shall "presumptively" be heard and decided by the court of appeals. "Pretrial writ proceedings challenging discovery orders or orders resolving motions in limine are presumptively assigned to the court of appeals." NRAP 17(b)(13).

This matter does involve discovery orders and the resolutions of motions in limine. Accordingly, this case is presumptively assigned to the Court of Appeals. This case should, however, be reviewed and decided by the Nevada Supreme Court for two reasons.

First, it raises as a principal issue questions of first impression involving the Crawford doctrine and an expert aiming to hide techniques to maintain a competitive edge. Secondly, the case presents an opportunity to decide when expert testimony is necessary to present forensic evidence, specifically with regard to footwear impressions. Finally, the Court can clarify the scope of disclosure that is required when a defendant asserts his confrontation clause right to challenge the accuracy of the forensic lab that conducted DNA testing in the case. All of these issues concern

Mr. Brown's constitutionally protected, cross-examination as well as fair and public trial rights under the United States and Nevada Constitutions. NRAP 17(a)(11).

The matters raised also present a principle issue of statewide public importance. NRAP 17 (a)(12). As the Homicide Court now entertains and decides novel issues in criminal law, this Court must intercede when those courts abuse their discretion, as "[the Nevada Supreme Court] may exercise its discretion to grant mandamus relief where an important issue of law requires clarification." Redeker, 127 P.3d at 522 (citing State v. Dist. Ct. (Epperson), 120 Nev. 254, 258, 89 P.3d 663, 665-66 (2004)). This Court has recognized that a writ may be proper where the issue is not fact-bound and involves an unsettled and potentially significant, recurring question of law. Buckwalter v. Eighth Judicial Dist. Court, 126 Nev. ___, 234 P.3d 920 (2010). See also Otak Nev LLC v. Eighth Judicial Dist. Court, 127 Nev. Adv. Rep. 53, 312 P.3d 491 (2011). If this Court does not intercede, then the issues raised here will be presented in a plethora of cases following the lead of the Homicide Court judges.

Mr. Brown requested a stay in District Court proceedings to present these issues to this Court in a Writ. Those requests were denied. App., Vol. 1, p. ??

II. JURISDICTION

Pursuant to Nevada Revised Statute ("NRS") 34.170, "a writ of mandamus shall issue in all cases where there is not a plain, speedy and adequate remedy in the

ordinary course of law." A writ of mandamus is available to compel the performance of an act which the law requires as a duty resulting from an office, trust or station or to control an arbitrary or capricious exercise of discretion. See NRS 34.160; Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601 (1981).

III. FACTS

A. Facts Relevant to the Court Precluding Mr. Brown from Cross-Examining Cellebrite's analyst about how they purportedly accessed the data of an encrypted smartphone.

The State had two paths forward to access the phone they claim belongs to Mr. Brown. The State sought an order from District Court Judge Valarie Adair requesting that Mr. Brown be compelled to give his fingerprint or passcode for the State to unlock the phone. App., Vol. 1, pp. 5-17. While the court granted that motion in part on May 31, 2018, it does not appear that a written order was ever filed with the court. App., Vol. 1, pp. 143-144. Instead, the State elected to take another path.

In this case, the State retained the Israeli company, Cellebrite, to extract the data from a password protected Samsung smartphone. Cellebrite has been associated with tortured dissidents in Bharain,[1] as well as the arrests of journalists in

[1] https://theintercept.com/2016/12/08/phone-cracking-cellebrite-software-used-to-prosecute-tortured-dissident/

Mynmar[2] and Ethopia.[3] A leaked trove of stolen data from Cellebrite indicates their customer list includes Russia, Morrocco, Sudan and Saudi Arabia.[4] Using undisclosed methods, Cellebrite purportedly accessed the data from the phone provided by the State. On August 2nd, 2019, the State filed "State's Notice of Motion and Motion in Limine to Address Cellebrite's Testimony Pertaining to Advanced Proprietary Software." In said motion, citing no legal authority, the State moved the Court, on Cellebrite's behalf, to preclude having a representative of Cellebrite testify publicly about how they accessed the phone purported to be Mr. Brown's. App., Vol. 1, pp. 40-47.

The affidavit in support of that notice made little sense and raised more questions than it answered. Exhibit A to the State's Motion was the affidavit entitled "Certification and Business Record of Cellebrite Inc." Id. Among other things, the affidavit noted that Cellebrite received a package via UPS from the LVMPD containing a Samsung SM-G920P cell phone. In May, 2018, Cellebrite determined the passcode to the cell phone and made a copy of the data contained on the device and then transferred it to an encrypted device. According to Cellebrite, no employee

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[2] https://www.washingtonpost.com/world/asia_pacific/security-tech-companies-once-flocked-to-myanmar-one-firms-tools-were-used-against-two-journalists-/2019/05/04/d4e9f7f0-5b5d-11e9-b8e3-b03311fbbbfe_story.html

[3] https://allafrica.com/stories/201910230001.html

[4] https://www.vice.com/en_us/article/3daywj/hacker-steals-900-gb-of-cellebrite-data

ever examined the applications on the phone, or the data of the device. Rather, Cellebrite received the cell phone, extracted its data and copied the data onto an encrypted drive without ever looking at the contents of the phone. Cellebrite's ability to access the data on the phone without examining the data on the phone, presents a logical impossibility which Mr. Brown's cellphone expert would need more clarification about to be able to advise counsel on the subject.

Mr. Brown opposed the State's motion citing the Confrontation Clause and specifically, objecting to the evidence under Crawford v. Washington, 541 U.S. 36 (2004) at the time of oral argument. The court ignored Mr. Brown's Crawford objection and reasoned that the technical nature of the testimony about Cellebrite's ability to access the phone would be boring and inscrutable, therefore, the testimony was unnecessary:

> MR. STORMS: Well, Judge, we've all—
>
> THE COURT: --to get this information.
>
> Mr. STORMS: --we've already raised—
>
> THE CORUT: Do you see what I'm saying? I mean why—
>
> MR. STORMS: I mean we—I mean we also would raise it on the *Crawford* issue we've previously raised that we—that this is done for the purposes of prosecution and that this—this doesn't meet any hearsay exception that exits in Nevada.
>
> And we—our position has always been it should be in an open hearing. The Courts ruled otherwise and we have objected—

THE COURT: Right.

MR. STORMS: --but—

THE COURT: But what I'm saying is let's just say that the analyst got up there on the easel and wrote down all the codes and the programing and everything like that, none of us would know—now what to do with it. The jury certainly a collection of random people from across the community aren't going to know what to do with it. So if that were to happen, it would be—my point is that would be meaningless without an expert to interpret it.

MR. STORMS: I would agree and that's why we want one.

THE COURT: And so—and so, you know to say well it's a *Crawford* violation without putting any context on the programing and the, you know, I'm just going to use generically science behind, to me—I mean to me that would be a problem if you're asking a lay person to try and figure out this, you know, coding or programing or whatever.

App. Vol. 1. pp 133-134.

On November 21st, 2019, the State requested a hearing on the record with an attorney from Cellebrite about the nature of the testimony the court will require of its analyst:

THE COURT: And I remember all that that it's the software and they want a protective order so that the defense can't question them and I remember all that.

MR. GIORDANI: Right.

THE COURT: So. This gentleman, Mr. Jake McDermott, is legal counsel for Cellebrite.

THE COURT: Okay.

MR. GIORDANI: The analyst who did the phone who actually accessed the phone, my understanding is he made a mirror image of the phone and then

sent it would be the chain of custody person from our position that would be necessary.

THE COURT: Okay. So this is just the -- no offense this is just the lawyer.

MS. TRUJILLO: Just a lawyer, yeah.

MR. GIORDANI: Yeah. Right. So –

MR. STORMS: So we get it all the time.

MR. GIORDANI: -- the issue from our end is I don't know that I have much power to compel him to send this person from New Jersey. And kind of the hope was that the Court could assure him that this is the parameters kind of what we're going to get into. It's not going to be in front of the jury or in public.

THE COURT: Right.

App. Vol 1. pp. 120-121.

The court indicated it would limit Mr. Brown's cross-examination of a forensic analyst from Cellebrite to chain-of-custody issue, when giving an attorney for Cellebrite, Mr. McDermott, assurances:

> THE COURT: Right. Right. But at -- you know, for right now the analyst would only be testifying really as to change custody. Basically, you know, where he works, what his job title is, that he received the phone, you know, whether it was in his sole, care, custody and control or what he did with it and then that he sent it back. So that really obviously would not get into any kind of proprietary or trade secrets. Anything that we did in the closed session hearing if the Court -- if the Court determines that somehow they can ask something beyond that narrow parameter that I just told you, you folks would have an opportunity to be heard on that. And anything's that said in the closed session hearing would be sealed by court order and it could only be opened either by order of the District Court or the Appellate Court for appellate review or potentially down the road a Federal Court in a federal habeas petition. So that would be the parameters of who would ever be able to see this.

> And, you know, I already stated we're not going to get really into detail about the programming or the science because frankly none of us are going to understand it. So, you know, I think in terms of real trade secrets were not going to be getting into that because I don't really think that would further anything in my opinion. What's your position in terms of A, just having the analysts come out here for that limited purpose in front of the jury chain of custody and B, a closed or closed session sealed proceeding which obviously is the State, the Court, just my Court staff and the defendant and counsel and in terms of -- and the corrections officers obviously, that would be it?
>
> MR. McDERMOTT: Sure. Absolutely. So -- so Cellebrite is always open and willing to help the Court as best we can.

App. Vol 1. pp 125-126.

Cellebrite otherwise has indicated that helping the Court as "best we can" does not involve being subject to meaningful cross-examination:

> THE COURT: Right. Because it's important that your -- that your analyst testify live in front of the jury just on the chain of custody issues with, you know, he got off the phone, what he, you know, what he did with it and then that he sent it right back is essentially –
>
> MR. McDERMOTT: Yeah.
>
> THE COURT: -- the issue there.
>
> MR. McDERMOTT: But sure. That's just to make clear that the matter that's all being on the record to make clear that it is dependent on payment of fees and also the protective order that this will all be occurring.
>
> MR. GIORDANI: Oh yeah. And we'll as we do with all out-of-state witnesses will arrange travel and get it all figured out through are out-of-state desk.
>
> MR. McDERMOTT: Okay. Then -- then yeah. It should be fine internally for us. And we'll assist as best we can.

App. Vol 1. p 130.

B. No expertise required: the jury can determine whether a partial bloody shoeprint was made by a shoe found in Mr. Brown's girlfriend's garage by looking at a few photographs.

On February 22, 2017, Crime Scene Analyst, K. Thomas, took photographs of partial footwear impressions in apparent blood located on the pavement at the south end of the covered parking space where the decedent was found, as well as partial footwear impressions leading away from the decedent. On March 20, 2017, employees of the Las Vegas Metropolitan Police Department executed a search warrant at the residence of Mr. Brown's girlfriend, Angelisa Ryder. Crime Scene Analyst M. McIntyre impounded a pair of red and black "Ralph Lauren Polo Sport" shoes, size 13 D, with reddish brown stains on the bottom of the right shoe. The presumptive blood test performed on the shoes with phenolphthalein yielded negative results. Counsel is unaware whether the State requested forensic comparison between the partial footwear impressions from the crime scene and the shoes impounded at Mr. Brown's girlfriend's residence, but no reports have been disclosed. The State did not endorse any experts on footwear impression for the trial.

The defense filed a motion to exclude evidence of the shoes obtained at Mr. Brown's girlfriend's house on the basis that said evidence was not probative and that, given that there was no blood found on the shoe, any probative value the evidence might have was outweighed by the prejudice this evidence might inject in

to the trial. App., Vol. 1, p. ?? The court took the issue under advisement. The court then issued the following order:

> COURT ORDERED, Motion DENIED in its entirety. Court took the issue of whether the photos of the Ralph Lauren Polo [shoes] should be admitted. Court FINDS the evidence to be more probative then prejudicial and that the photos of the bloody footprint can be understood and interpreted by lay jurors.

App., Vol. 1, p. 151.

Mr. Brown then filed a "Motion to Declare the Court's Order Finding that the State may Present Footwear Impression Evidence to the Jury through Lay Witnesses Void as it Violates Mr. Brown's Due Process and Fair Trial Rights." The Court rejected counsel's arguments on November 21, 2019, saying in part:

> THE COURT: [. . .] You know, sometimes maybe there's a fingerprint on a water bottle and the defense's argument, well that print could have been left at any time. You know, we don't know that the print was left, you know, at the time of the killing or whatever. That's not burden shifting. I mean that's the just weight to go to the evidence, so you can argue that the weight should be slight.
>
> MR. STORMS: But we –
>
> THE COURT: I don't think its burden shifting.
>
> MR. STORMS: -- but we don't let jurors decide whether or not the -- the -- you know, the -- the fingerprint on the waterbottle matches the -- the –
>
> MS. TRUJILLO: The ridges –
>
> MR. STORMS: -- the ridges on –

THE COURT: Well that's because that's more technical.

MS. TRUJILLO: --on a photograph

THE COURT: Yeah. But that's exactly the issue I took under advisement as to whether or not you can look at it and say it's similar. It's similar. I mean it's -- okay. It's the same, you know.

App., Vol. 1, pp. 99-100.

The State would only be required to present a witness for this tread wear analysis if they were going to argue that the partial footwear impressions demonstrated that Mr. Brown was the person wearing the shoe at the time the impressions were made. Otherwise, no expert is necessary, the State could argue to the jury that the footwear impressions came from the recovered shoes based upon the jury inspecting photographs of these items in controversy.

C. Defense challenge to the Metropolitan Police Department's DNA Lab: District Court precedent only provides that the defendant receive corrective action reports related to the instant prosecution.

In this case, touch DNA from a crime scene analyst who did not work on the case was found on a swab sample taken from the accelerator pedal of the decedent's vehicle. The corrective action report for this apparent error noted that the crime scene analyst in question did not work on this case. The analyst was also not present during the processing of the vehicle in this case. In fact, the analyst whose DNA was found in the sample tested from the accelerator pedal of the

decedent's vehicle was not documented to be in the CSI garage where the vehicle was tested until the day after the processing of the vehicle took place.

In the case against Mr. Brown, the State seeks to introduce at trial that Mr. Brown's touch DNA was found on a nitrile glove near the decedent at the crime scene. As this particular piece of touch DNA evidence is likely to be viewed as damaging evidence against Mr. Brown, his challenge to the accuracy of the lab's DNA testing goes directly to his ability to defend against the charges against him through cross-examination.

With respect to this issue, Judge Adair cited Judge Leavitt only providing the defense in another case copies of corrective action reports for the analysts who worked on the testing performed in the case. App., Vol. 1, p. 135. Based upon Judge Leavitt's ruling, Mr. Brown's motion for corrective action reports to challenge the accuracy of the testing performed by the LVMPD DNA Lab was denied.

IV. PROCEDURAL HISTORY

On September 14, 2017, Mr. Brown was arraigned on an Indictment in District Court, Department Three (3). Mr. Brown entered a plea of Not Guilty and waived his state right to a speedy trial. Thereafter, the State filed a Second Superseding Indictment, adding one count as to Mr. Brown. On October 19, 2017, Mr. Brown again entered a plea of Not Guilty and waived his state right to a speedy trial.

Thereafter, this case was transferred to District Court, Department Twenty-One (21), Judge Valerie Adair, presiding. On December 19, 2017, the District Court received a Third Superseding Indictment. At that hearing, the Judge Adair noted that the court did not need to arraign Mr. Brown because there were no charges added, only additional evidence and testimony regarding the charges. At a status check on October 31, 2017, the District Court scheduled trial for June 18, 2018. On April 11, 2018, Nicholas Wooldridge filed a Motion to Withdraw as Attorney of Record. In the interim, on April 23, 2018, the State filed "State's Notice of Motion and Motion to Compel Defendant Brown's Cellular Phone Passcode, or Alternatively, to Compel Fingerprint." Judge Adair granted Mr. Wooldridge's Motion to Withdraw as Attorney of Record on April 24, 2018 and appointed the Special Public Defender's Office.

Thereafter on April 26, 2018, the Special Public Defender's Office confirmed as counsel, subject to a review of the discovery. At a status check on May 8, 2018, counsel informed the court that while Mr. Wooldridge provided the discovery in his possession, several items were missing. Counsel nonetheless confirmed as counsel and informed the court that she completed a conflicts check on the witnesses listed in the State's notices at that time. At that hearing, the State agreed to provide counsel with complete discovery as well as agreed that counsel could file an opposition to

its Motion to Compel Defendant Brown's Cellular Phone Passcode, or Alternatively, to Compel Fingerprint on May 18, 2018.

Defense counsel filed Mr. Brown's "Opposition to State's Motion to Compel Defendant Brown's Cellular Phone Passcode, or Alternatively, to Compel Fingerprint on May 18, 2018." Judge Adair heard arguments on the matter on May 31, 2018 and ordered the Motion granted in part as to the fingerprint and denied without prejudice as to the passcode. App., Vol. 1, pp. 143-144. At a Status Check on August 30, 2018, the State informed the District Court that according to the Las Vegas Metropolitan Police Department (LVMPD), Mr. Brown's cell phone was still on the machine and he would be notified when the process was complete. On November 27, 2018, Chief Deputy District Attorney John Giordani informed the District Court that the LVMPD had to outsource the phone records retrieval. App., Vol. 1, p. 146.

Counsel filed several pre-trial motions, including the following relevant to the instant Writ: 1) Defendant Larry Brown's Motion in Limine to Preclude the State from Presenting as Evidence Specific Items Recovered from the Search of Angelisa Ryder's Residence on March 20, 2017; 2) Defendant Larry Brown's Motion for Disclosure of Corrective Action Reports, and; 3) Defendant Larry Brown's Motion in Limine to Preclude all Cell Phone Information Obtained by Cellebrite and

Response to State's Motion in Limine to Address Cellebrite Testimony Pertaining to Advanced Propriety Software.

A. Procedural Background to Cellebrite Technology Litigation

On August 8, 2019, counsel for the State also filed, State's Notice of Motion and Motion in Limine to Address Cellebrite Testimony Pertaining to Advanced Proprietary Software. Defense counsel filed, "Defendant Larry Brown's Motion in Limine to Preclude all Cell Phone Information Obtained by Cellebrite and Response to State's Motion in Limine to Address Cellebrite Testimony Pertaining to Advanced Propriety Software" on August 12, 2019. The State's motion was more of a notice to the District Court and counsel for the defense that Cellebrite would not testify in a trial without a protective order. The District Court heard arguments on several motions on October 29, 2019, including the motions pertaining to Cellebrite, but reserved ruling on the matter until time of trial. While the court minutes indicate it was defense counsel's request for a hearing outside of the presence of the jury[5], that request was an alternative one after noting counsel should be able to confront the entirety of the evidence against Mr. Brown in front of a jury pursuant to the Sixth Amendment to the United States Constitution. On November 21, 2019, the District Court, State and counsel for Mr. Brown called counsel for Cellebrite, Jake

[5] No transcripts were available at the time of this filing.

McDermott, on the record, in open court to discuss his concerns for their product's trademark secrets.

The Court made it clear that any person Cellebrite allowed to testify would only testify to chain-of-custody type information before a jury. The Court further informed Mr. McDermott that it would hold a closed door, sealed hearing to allow defense counsel to cross-examine the forensic analyst. The Court further offered that counsel for Cellebrite could be present at the time of the sealed hearing via telephone to ensure the privacy of any trade secrets or proprietary information.

Counsel for Brown again reiterated concerns regarding the Confrontation Clause and Crawford and for those reasons indicated our intent to include this issue in the instant Writ of Mandamus. The Court stated that such a request was premature, despite the fact that the Court assured counsel for Cellebrite that any questioning in front of jury would be limited to chain-of-custody questions. No date has been scheduled for the sealed hearing, but counsel for both parties have agreed that it will take place prior to the witness's scheduled testimony.

Mr. Brown is presently charged by way of Third Superseding Indictment with one count of Conspiracy to Commit Robbery, one count of Robbery with Use of a Deadly Weapon, one count of Murder with Use of a Deadly Weapon and one count of Ownership or Possession of Firearm by Prohibited Person. Trial was originally

scheduled to begin on December 2, 2019, but because the State filed its Ninth Supplemental Notice of Witnesses and/or Expert Witnesses on November 20, 2019, as well as disclosed a firearm report, the District Court continued the trial to cure the untimeliness of the disclosure and denied defense counsel's request to strike the evidence as well as the newly noticed firearms expert. Trial is now scheduled to begin December 9, 2019.

B. Procedural History for Forensic Shoe Print Evidence Litigation

While counsel's argument began as a relevancy concern, based on the State's opposition that concern morphed into an issue with an area of forensic science that is currently in question across the nation, namely footwear impression analysis. At the time of argument with regard to the specific search items, Judge Adair made counsel's argument before allowing counsel to argue the matter. The Court identified the same issues that counsel noted after reading the State's opposition, which was the concern that lay persons would be allowed to visually compare impressions and determine whether they matched collected evidence. Therefore, counsel agreed with the Court rather than repeat the same concerns. In preparation for the argument against such a comparison by the State, counsel for Brown printed the photographs of the bloody impression and a photograph of the bottom of a firefighter's boot to show the court. Counsel provided the Court with both photographs at the time of the hearing. The photograph of the firefighter's boot was

used by the LVMPD to exclude him from the footwear analysis. Thereafter, the State, via email, provided the court with additional photographs of bloody footprints at the scene as well as photographs of the Polo shoes found at Ms. Ryder's residence. The court took the matter under advisement. On November 12, 2019, the District Court issued a minute order denying Mr. Brown's Motion and concluded that the evidence was more probative than prejudicial and that the photographs of the bloody footprint could be understood and interpreted by lay jurors. App., Vol. 1, p. 151.

Because the minute order was filed after the deadline for Notice of Expert Witnesses, counsel for Brown filed Defendant's Motion to Declare the Court's Order Finding that the State May Present Footwear Impression Evidence to the Jury Through Lay Witnesses Void As it Violates Mr. Brown's Due Process and Fair Trial Rights as well as a Supplemental Notice of Defendant's Expert Witnesses on November 15, 2019, requesting the Court allow counsel to call an expert witness to testify about footwear impressions.

C. Procedural History to LVMPD DNA Lab Corrective Action Reports

Counsel filed "Defendant Larry Brown's Motion for Disclosure of Corrective Action Reports" on November 8, 2019. The District Court heard argument on this motion on November 14, 2019. While counsel for Brown requested all Corrective Action Reports related to the LVMPD labs, citing case law that allows defense counsel to challenge the lab it its entirety, including procedures and processing

evidence, the District Court limited the Corrective Action Reports order to a five year period and only for those employees working on the instant criminal case.

V. ISSUES PRESENTED

1) Whether the State can introduce as evidence the purported contents of a password encrypted smartphone a private company was hired to access without subjecting the company's analyst to public cross-examination because of the private company's assertion of "proprietary software" and "trade secrets" about their methodology?

2) Can the State show the jury photographs of shoes and partial footwear impressions and argue that the depicted shoes made the depicted partial footwear impressions without introducing any expert testimony on the forensic science of footwear impression comparison?

3) Does the District Court abuse its discretion when it limits the discovery of errors made by DNA analysts at the Metropolitan Police Department's Forensic Lab only to those technicians that physically worked on Mr. Brown's case?

VI. RELIEF SOUGHT

Petitioner prays that this Court issue a Writ of Mandamus directing Respondent, the Honorable Valerie Adair, to allow counsel to cross-examine the analyst from Cellebrite before the jury about the methodology employed to extract information from the phone in this case, require the State to present expert testimony when it uses forensic footwear impression evidence and allow Mr. Brown access to data about errors made by the Forensic Lab as a whole rather than limiting it to the technicians called by the State in this case.

VII. LEGAL AUTHORITY, ANALYSIS AND ARGUMENT

I. For the report generated by Cellebrite to be admitted as evidence, their analyst and methodologies must be subject to cross-examination before the jury.

The Sixth Amendment to the United States Constitution guarantees a criminal defendant not only the right to a public trial but also the right to confront the witnesses against him. Davis v. Alaska, 415 U.S. 308, 315 (1974). It is undisputed that confrontation includes the right to cross-examine witnesses. To be sure, the United States Supreme Court has long held,

> "[t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process."

Chambers v. Mississippi, 410 U.S. 284, 294 (1973).

Cross-examination is imperative because it is, "the principal means by which the believability of a witness and the truth of his testimony are tested." Davis v. Alaska, 415 U.S. at 316. The right to cross-examine witnesses is so fundamental that the United States Supreme Court has stressed that,

> [I]ts denial or significant diminution calls into question the ultimate 'integrity of the fact-finding process' and requires that the competing interest be closely examined.

Chambers v. Mississippi, 410 U.S. at 295 (citing Berger v. California, 393 U.S. 314, 315) (1969).

Mr. Brown has a constitutional right to cross-examine the witnesses against him in a public trial and to have an opportunity to effectively challenge the State's evidence against him in front of a jury of his peers. Mr. Brown has the right to challenge the information supposedly taken from the phone. He has a right to ask at trial and for the jury to hear answered: How was the data removed? How do we know this information is an accurate copy? How do we know the data was unaltered? How do we know this information was all the information on the phone? In this instance, the Court intends to have a closed-door, sealed hearing where an analyst from Cellebrite would be available for some sort of questioning, although it is not clear how much leeway counsel will receive to challenge and probe the methodology Cellebrite uses to extract information from cell phones, this all seems irrelevant as the district court has decided such cross-examination will not be presented to the jury. The Court has indicated that the only cross-

examination subject at the time of trial will be limited to chain-of-custody issues, and that the methodology the analyst used to access the phone will be confusing and unintelligible to the court, lawyers and jury. This ruling runs contrary to Crawford v. Washington.

Prior to Crawford v. Washington, 541 U.S. 36, 59 (2004), the United States Supreme Court allowed the admission of an unavailable witness's out-of-court statement if it had "adequate indicia of reliability." What gave an out-of-court statement "adequate indicia of reliability" was that it either "falls within a 'firmly rooted hearsay exception' or bears 'particularized guarantees of trustworthiness.'" Crawford v. Washington, 541 U.S. 36, 42, 124 S. Ct. 1354, 1359 (2004) (citing Ohio v. Roberts, 448 U.S. 56, 66 (1980). Crawford did away with the "particularized guarantees of trustworthiness" test for out-of-court hearsay statements as that clause had, in effect, become an exception that was swallowing the rule of confrontation of witnesses at trial by the defense. Crawford held that testimonial hearsay statements of a witness who does not appear at trial are inadmissible under the Confrontation Clause of the Sixth Amendment unless the witness is unavailable to testify, and the defendant has had a prior opportunity to cross-examine the witness. Crawford v. Washington, 541 U.S. 36, 59 (2004).

The testimony of the Cellebrite analyst as well as the information they generated for the prosecution squarely falls under the Crawford rule. The phone

was analyzed by Cellebrite strictly for the purposes of this prosecution and is thereby testimonial hearsay. There is no hearsay exception in Nevada for "trade secrets" or "proprietary information," so the request by Cellebrite is not rooted in a well-established exception to the hearsay rule. Moreover, the closed-door, sealed hearing solution does not satisfy Crawford as this information will not be shared with the jury. The court's proposed solution to Cellebrite's desires violates the mandate of Crawford v. Washington, 541 U.S. 36 (2004). Moreover, Cellebrite has made clear it will not participate in this prosecution if it is subject to cross-examination.

The District Court's solution also violates two of the foundational tenets of American society—that our society protects the rights of individuals and promises that the government's exercise of power will yield to the rule of law. These premises are basic to the operation of law, despite the inconvenience they impose. It may be more convenient for the State to obtain information from the phone they associate with Mr. Brown by employing a foreign corporation's technology to defeat encryption, as Cellebrite does for the State security services of nations such as Saudi Arabia, Myanmar and Russia. It would also be more convenient for the State to search citizen's homes without a warrant, or when a warrant is used, for the government to be under no obligation to produce the contents of the warrant so that the accused can challenge the basis for the search.

It may be more convenient for law enforcement to not give suspects' Miranda warnings before interrogations, or to employ force to extract information. If the State were to, however, try to use information from an unlawful search or involuntary confession at trial, such illegal investigative measures would be excluded from the courtroom. Our society tempers the power of government with laws that protect the individual.

There is no justification for treating Cellebrite's technology any different from any other search. The financial gains Cellebrite seeks to protect by hiding their methodology must yield to Mr. Brown's right to be confronted with the witnesses against him and have a full opportunity to cross-examine those witnesses. The State elected to pursue this manner to investigate their case, despite having an alternative path, i.e., the ability to compel Mr. Brown to produce his fingerprint to unlock the phone.

Counsel is unaware of any area of law that allows the admission of a type of evidence shielded from cross-examination. Foreclosing Mr. Brown from challenging the methodology used by Cellebrite has the effect of creating a presumption that the evidence they produce at trial is valid and unassailable. This violates Mr. Brown's right to due process, a fair trial and his confrontation clause rights.

II. Footwear impression comparison is a field of forensic science beyond the grasp of a lay juror's common experience, requiring expert testimony for such evidence to be admissible.

Although the Court has never specifically ruled on whether expert testimony is required to present forensic footwear impression evidence, precedent in Nevada strongly supports the notion that the footwear impression evidence the State intends to present should be introduced through an expert witness. In Burnside v. State, 352 P.3d 627 (2015), the State used a Sprint/Nextel record custodian to explain how cell phone signals are transmitted from cell sites, including circumstances when the cell site nearest the cell phone is not used. The records custodian was not noticed as an expert. As the custodian's testimony concerned "matters beyond the common knowledge of the average layperson" his testimony was found by the Nevada Supreme Court to constitute expert testimony. In Burnside, the court found that since Burnside did not explain what he would do differently if proper notice had been given and did not request a continuance pursuant to the guidelines of NRS 174.295(2), the Supreme Court did not ascertain that there was prejudice. Burnside, at 637.

Here, the State intends to present the jury photographs of partial footwear impressions in blood and photographs of the impounded shoes that tested negative

for blood. These items will be presented without any expert testimony.[6] As the matching of a particular tread wear pattern in a footwear impression to a shoe is a process of "feature-comparison," such a process involves the same sort of analytic comparison utilized in latent fingerprint analysis, hair analysis, firearm analysis and DNA analysis.

In 2016, the President's Counsel of Advisors on Science and Technology issued a report titled "Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods" that examined the scientific support for various feature-comparison methods presented in criminal trials. The report did not examine "whether examiners can reliably determine class characteristics—for example, whether a particular shoeprint was made by a size 12 shoe of a particular make" –noting that studies still needed to be undertaken to estimate the reliability of footwear analysis aimed at class characteristics. Instead the report focused on

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[6] Four published Nevada cases reference footwear impression evidence. Out of those four, two specifically mention expert testimony on the subject. The other two cases do not mention such testimony but the issue was not in controversy so it is unclear if no expert was used or if the court did not mention the fact because it was not relevant to the legal analysis. Doyle v. State, 116 Nev. 148, 158, 995 P.2d 465, 471 (2000) (no mention of expert testimony); Walker v. State, 113 Nev. 853, 861, 944 P.2d 762, 767 (1997); Williams v. State, 113 Nev. 1008, 1016, 945 P.2d 438, 443 (1997); Atkins v. State, 112 Nev. 1122, 1125, 923 P.2d 1119, 1121 (1996) (no mention of expert testimony).

reliability conclusions for analysis that purport to be able to match a footwear impression to a specific piece of footwear. See Presidential Counsel of Advisors on Science and Technology "Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods", pages 114-117 (2016). The report noted that there are no empirical studies that measure the examiners accuracy as to the soundness of their forensic methodology to "identify" a particular piece of footwear as the source of an impression, noting that the claims made lack any scientific foundation. Id. at 115. The report noted that the process of identifying an impression as coming from a particular shoe relies "entirely on an examiner's subjective judgment." Id. at 116. As this is the state of affairs in this area of forensics, the report urges that it is, "essential that the scientific validity of the method and estimates of its reliability be established by multiple, appropriate black-box studies." Id. In this case, the District Court has ruled that the jury can determine on their own whether the shoes found at Mr. Brown's girlfriend's home can be "identified" as the shoes that created the partial footwear impressions found on the scene. To date, there has been no academic study that establishes with evidence that a trained forensic footwear impression analyst can accurately make such an identification. To ask a lay jury to make this evaluation is error.

We do not let juries decide for themselves whether a latent print matches the defendants, or that jurors, unaided, get to evaluate if the hammer-strike pattern on a

spent shell case matches the tool marking on the hammer of a suspect murder weapon. We may all wear shoes and thus be more familiar with their basic features than the ridges of fingerprints, but asking a jury to decide whether a partial print matches the specific shoes photographed in this case is beyond the capacity of jurors.

Given that what if any value footwear impression evidence has to a fact-finder would be based upon the subjective experience and expertise of a trained professional, jurors cannot be asked to make such a comparison on their own. For the District Court to allow such arguments, unmoored by the much more complicated, scientifically dubious, forensics behind such comparisons is dangerous. It positions the prosecutor to run afoul of the science behind the forensic evidence he seeks to introduce. This court has recently spoken on the impropriety of a prosecutor making arguments unsupported by expert testimony. See Sevier v. State, No. 74542 (2019). The District Court's ruling in this case creates the environment for the State to make the same mistake.

Finally, allowing the jurors to make this evaluation unaided by any information from the State about the forensic science of footwear impression is to create a presumption that this evidence is valid. It also shifts the burden to the defense to potentially call an expert witness to explain an area of forensic science that is flawed. Under the circumstances, since the District Court is not requiring

the State to present expert testimony on footwear impressions, if Mr. Brown calls an expert to explain these issues he will in effect be forced to rebut a presumption that the comparison of photographs is a valid way to determine if there is an exact match between a shoe and a partial impression. Such a process is tantamount to burden shifting, violating Mr. Brown's due process, confrontation clause and fair trial rights.

III. Precluding Mr. Brown from obtaining evidence of the overall reliability of the LVMPD DNA Crime Laboratory is Improper

A recent, citable, unpublished opinion by this Court, made clear that it is error for a defendant to be precluded from questioning a DNA analyst about mistakes made in other LVMPD lab cases unrelated to the one at trial. Hover v. State, No. 63888, 2016 WL 699871; 2016 Nev. Unpub. LEXIS 468 (Nev. Feb. 19, 2016). In Hover, the defendant argued that the district court abused its discretion in preventing him from cross-examining the DNA analyst about errors made during the forensic analysis process in other cases. Id. The record indicates that the analyst questioned by the defendant had worked at the lab at the time when significant errors were revealed. Id. Hover claimed that the district court abused its discretion in concluding that the events of which Hover complained were irrelevant without conducting an evidentiary hearing. Id; see also Patterson v. State, 129 Nev. 168, 176, 298 P.3d 433, 439 (2013) ("[A]n abuse of discretion occurs whenever a court fails to give due consideration to the issues at hand.").

This Court agreed that the District Court should have allowed the consideration of this matter in Hover's case, but ultimately concluded in that instance the error was harmless. See Valdez v. State, 124 Nev. 1172, 1189, 196 P.3d 465. 476 (2008) ("If the error is of constitutional dimension, then ... [this court] will reverse unless the State demonstrates, beyond a reasonable doubt, that the error did not contribute to the verdict.").

Here, the Defendant is asking for the right to examine the exact type of information sought by the defendant in Hover. The State and the LVMPD's attorney argued against producing these items to the defense. The lawyer for the LVMPD specifically requested that Mr. Brown only be provided corrective action reports if they were "related to the prosecution." App., Vol. 1, p. 153. The District Court complied with the LVMPD's request, limiting Mr. Brown to the corrective action reports for the analysts that worked on his case. Judge Adair reasoned that the limitation was the appropriate remedy based upon what she understood Judge Leavitt to have done in another homicide case. App., Vol. 1, p. 135. Yet, this solution does not allow Mr. Brown meaningful information to challenge the accuracy of LVMPD's lab as an entity, only those analysts that worked on this particular case. It would seem that the District Court is adopting what its sister court did upon a similar request for corrective action reports. This solution evades Mr. Brown's request that would have given him the ability to challenge the

accuracy of DNA analysis performed at the LVMPD lab. As the Court did not address Mr. Brown's request and instead endorsed Judge Leavitt's precedent, this decision failed to "give due consideration to the issue at hand" and was therefore an abuse of discretion. See Patterson v. State, 129 Nev. 168, 176, 298 P.3d 433, 439 (2013). This Court should intercede in this case as these district court level "precedents" that do not remedy the issue the court addressed in Hover will present the appellate courts with error again and again. Hover v. State, No. 63888, 2016 WL 699871; 2016 Nev. Unpub. LEXIS 468 (Nev. Feb. 19, 2016).

CONCLUSION

Mr. Brown requests that this Court order the District Court to allow counsel a full opportunity to cross-examine any Cellebrite employee about how the company accessed the contents of the phone in question. Mr. Brown further requests that this Court preclude the District Court from allowing the State to present footwear impression evidence and then ask that the jury make improper inferences without the assistance of an expert. Finally, Mr. Brown requests that this Court order the District Court to require the Las Vegas Metropolitan Police

. . .

Department to disclose all corrective action reports associated with its lab without limiting the disclosure to only those analysts that worked on the case.

DATED this 26th day of November, 2019.

RESPECTFULLY SUBMITTED BY:

W. JEREMY STORMS
Nevada Bar #010772
MONICA TRUJILO
Nevada Bar #11301

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this writ, and to the best of my knowledge, information and belief, is not frivolous or interposed for any improper purpose. I further certify that this writ complies with the applicable Nevada Rules of Appellate Procedure, in particular NRAP 21, which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I further certify that this brief complies with NRAP 32, in that it is double spaced, and is in 14 point font, Times New Roman, and formatting requirements under NRAP 21. I understand that I may be subject to sanctions in the

event that the accompanying writ is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 26th day of November, 2019.

RESPECTFULLY SUBMITTED:

W. JEREMY STORMS
Nevada Bar #010772
MONICA TRUJILO
Nevada Bar #11301

VERIFICATION

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

W. JEREMY STORMS, being first duly sworn, deposes and says:

1. That I am an attorney duly licensed to practice law in the State of Nevada and a deputy for the Special Public Defender, appointed counsel for Larry Brown;

2. I have read the foregoing Petition for Writ of Mandamus, or in the Alternative, Writ of Prohibition and knows the contents therein and as to those matters they are true and correct and as to those matters based on information and belief I am informed and believe them to be true;

3. That Larry Brown has no other remedy at law available, and that the only means to address this issue is through the instant writ;

4. That Counsel signs this verification on behalf of Larry Brown, under Abdul Howard's direction and authorization.

Further your Affiant sayeth naught

W. Jeremy Storms

SUBSCRIBED AND SWORN to before me

this 26th day of November, 2019.

VERONICA VILLAGRANA
NOTARY PUBLIC
STATE OF NEVADA
My Commission Expires: 09-29-22
Certificate No: 02-78089-1

NOTARY PUBLIC, in and for
The County of Clark, State of Nevada

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 26th day of November, 2019, a copy of the foregoing Writ was filed with the Nevada Supreme Court. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

Clark County District Attorney's Office
Regional Justice Center
200 Lewis Ave., 3rd Floor
Las Vegas, NV 89155

I further certify that on November 25, 2019 a copy was mailed to the following:

The Honorable Valerie Adair
Eighth Judicial District Court, Department XXI
Regional Justice Center
200 Lewis Avenue, 11C
Las Vegas, Nevada 89101

RESPECTFULLY SUBMITTED:

W. JEREMY STORMS
Nevada Bar #010772
MONICA TRUJILO
Nevada Bar #